IN THE

United States
Circuit Court of Appeals
For The Ninth Circuit

JOHN McKUNE,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4144

Brief of Defendant in Error

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Briefly, the facts involved in this case are as follows:

The defendant was indicted by the Grand Jury charging in eighteen counts the violation of certain provisions of the Harrison Narcotic Act. A verdict of guilty was rendered by the jury on all counts, except the tenth, eleventh and twelfth, and upon these counts the government offered no proof, and when it rested its case, moved the court for permission to dismiss, as shown by the record on page 45.

For the convenience of the court, it may be stated at this time that all of the counts in the indictment were predicated upon six transactions charging from the 10th day of April, 1922, to the 15th day of April, 1922. All of the counts are similar and identical in form, except

that on each date the third count, which alleges a sale, is made to different parties. For instance, the first count charges the purchase of a quantity of cocaine. The second count charges, on the same date, the possession of the same amount, with intent to sell, and the third count charges the sale of the same amount at the same time and place to the witness J. T. Robertson; and this follows throughout the entire indictment, the only change being in the amount of cocaine, the dates upon which the transactions were executed and the party to whom the same was made.

For the sake of clearness, we will follow the assignments of error in the order adopted by counsel in his brief on behalf of the plaintiff in error.

ARGUMENT

1.

The first assignment of error deals exclusively with the question of entrapment and upon which point counsel cites the case of Grimm v. United States, 156 U. S. 604, Andrews v. United States, 162 U. S. 420, Woo Wai v. United States, 223 Fed. 412 and Butts v. United States, 273 Fed. 35.

Discussing first the Butts case, we have no complaint to find with this decision other than that it is not applicable to the case at bar. In that case the officers incited a person to commit a crime, who had no intention to do so and it was only upon the inducements and entrapments of the officers that he permitted himself to become their victim. It is our opinion that this case

clearly states the law upon the subject in a case of that character. However, in the case at bar the defendant makes no plea of an entrapment. His own testimony, both on direct and cross-examination, as shown by the record, forecloses any such contention, for his testimony, briefly, is that he never met any of the parties whom the government alleged, and who testified at the trial had met him on the days in question, had several discussions with him and to whom he sold the narcotic drugs.

He further denied ever having sold any narcotic drugs to the parties alleged in the indictment, and, furthermore, tends to establish an alibi that he was not present at the places in question at the time the government alleged and the jury found that the cocaine was sold.

The other three cases cited by the plaintiff in error are certain and positive opinions in upholding the government's contenton in this case. As this issue has been passed upon by this court in two recent cases, we feel that a further discussion of it is unnecessary and cite.

Fiunkin v. United States, 265 Fed. 1;
Ritter v. United States, 293 Fed. 187.

The following citations are also applicable to the point at issue:

Billingsley v. United States, 274 Fed. 86;
Fisk v. United States, 279 Fed. 12;
Lucadamo v. United States, 280 Fed. 653;
Smith v. United States, 284 Fed. 673;

Ramsey v. United States, 268 Fed. 825;
Rossi v. United States, 293 Fed. 896.

2.

The third assignment of error is based upon the first and second, and must necessarily be bound by the result therein.

The second assignment is as follows:

> "Error of the Court in sustaining an objection of the Government to an offer by the defendant to prove by Mrs. Amy Luloff, a witness for defendant, acts of prostitution, or acts from which prostitution could be reasonably inferred on the part of Mrs. Jack Robertson, one of the main witnesses for the Government, who had testified on cross-examination in answer to an interrogatory of defendant, as to whether she had ever been a prostitute, that she had not."

In support of this contention counsel for the plaintiff in error cites a number of cases from the Supreme Court of the State of Washington, and the case of Tla-Koo-Yel-Lee v. United States, 167 U. S. 274. The court in discussing some of the issues involved in that case, does not specifically pass upon the question raised here by counsel, but owing to the strained facts and circumstances connected with the case, the court passes over the issue partially raised there without any extended discussion and we are of the opinion that the holdings in the federal courts upon the question of collateral issues is much different than that contended for by counsel for the plaintiff in error.

Jones on Evidence, at page 1068, paragraph 840, discusses the question as follows:

> "Although we have seen that in many jurisdictions much latitude is allowed in cross-examination to effect the credibility of witnesses by proof of specific acts or misconduct, *it must not be inferred that this allows independent or extrinsic evidence of such acts. The rule is very general that the inquiry is confined to cross-examination, and, further, that the evidence of the witnesses on such collateral matters can not be contradicted.* The rule followed in many states by which the witness can be cross-examined as to specific facts tending to disgrace him, often works great hardship, and it would be intolerable that any witness might be surprised by an array of witnesses and compelled to defend past transactions having no connection with the suit. In various states evidence of this character is forbidden by statute." (Italics ours).

Cyc., in Volume 40, at pages 2600, 2601, 2602 and 2603, on this subject, is as follows:

> *"The attack must be confined to the general character or reputation of the witness* and not directed to any particular trait of character, except, of course the lack of veracity, *nor can the witness be impeached by showing particular facts or that he has committed particular wrongful or immoral acts.* So a witness can not be impeached by the evidence showing particular instances in which he has been untruthful or corrupt or dishonest, *particular acts of unchastity or immorality* or the maintenance of illicit relations with a particular individual. Circumstances or occurrences indicating a lack of morality, that he is living apart from his wife, intoxication upon particular occasions, or the commission of crimes of which the witness has not been convicted. *The rule is, however, subject to an exception in the case of a conviction of crime,* and, according to some authorities, does not apply on the

cross-examination of the witness himself." (Italics ours).

The following, in support of this rule, is taken from 28 Ruling Case Law, paragraph 202, at page 613:

> "The rule is firmly established that a witness can not be impeached by showing the falsity of his testimony concerning facts formerly stated and answered by a witness upon cross-examination upon a merely collateral matter can not be contradicted. *If he be asked as to a collateral fact, his answer is conclusive upon the party examining him.*" (Italics ours).

In the case of Fisk v. United States, 279 Fed. 12, at page 17, (C. C. A.) the court, in discussing this issue, states the following:

> "It is also assigned as error that the court improperly limited counsel for defendant in his cross-examination of the witness Harris, particularly in reference to whether the witness was intimate with a certain negro woman who at that time lived on Welling Street in the City of Memphis. Before an objection was interposed to this question, the witness answered that he was not. This, of course, was the end of that inquiry, even though it were conceded that the credibility of the witness could be impeached in this manner. It was purely collateral to the issue on trial and counsel was bound by the answer of the witness. Citing the Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258, (C. C. A.)"

The Seventh Circuit Court of Appeals in the case of Daniels v. United States, 196 Fed. 459 at page 464, discussing a similar question, expresses the rule as follows:

> "This ruling was right. Hassel's credibility as a witness could not be tried by raising and trying an independent issue as to his honesty, his interest or his motives."

A similar question is discussed in Bullard v. United States, 245 Fed. 837, Fourth Circuit. There the court in passing upon the question states at page 840:

> "We are not aware of any theory upon which this ruling can be defended. The subject matter of the question, addressed to Bullard, was obviously collateral to the issue on trial and the government was bound by his answer. Indeed, it is elementary that contradiction in such case is not ordinarily permissible."

See also Miller v. Territory of Oklahoma, 149 Fed. 330, Teese v. Huntingdon, 64 U. S. 2 (23, Wall.), Young v. Corrigan, 208 Fed. 431.

For the sake of argument let us assume that the trial court may have committed error in refusing to permit such a question to be answered by the witness, Mrs. Robertson. The sentence in this case was a commitment in the United States penitentiary at McNeil Island for a period of five years, which sentence can be sustained by any single count in the indictment. The only counts to which the witness, Mrs. Robertson, testified were counts four, five and six, the government offering no proof on counts X, XI and XII of the indictment. This leaves counts I, II, III, VII, VIII, IX, XVI, XVII and XVIII sustained by the witness Jack T. Robertson and others, and counts XIII, XIV and XV by the witnesses Orville Wright and others. So in the instant case it could not have had any prejudicial effect upon the plaintiff in error, as the verdict and sentence are sustained by other counts, not considering counts IV, V and VI.

The record on page 44 clearly establishes that the informants used by the government as witnesses were in

the employ of E. G. Fleming, the chief of police of Toppenish, Washington, and that they had information that the plaintiff in error had been selling and distributing narcotic drugs prior to the time that any of the witnesses on behalf of the government met plaintiff in error McKune; that he had possession of the drugs and was a willing vendor to any prospective purchasers, so we respectfully submit that there is no basis for the defense of an entrapment, that no error was committed by the trial court and that the verdict and judgment of the court should be affirmed.

Respectfully submitted,

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